IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

DOCKET NO. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

Cases Cited: PAGE

PAGE

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Questions Presented

1. Does application of New York City Landmarks Law to Grand Central Terminal deprive the owner of due process of law where the owner of the property did not establish that the landmarks designation interfered with continued use of the Terminal or prevented it from earning a reasonable rate of return?

2. Assuming, arguendo, that the Landmarks Law, as applied to Grand Central Terminal is an invalid police regulation, are the appellants entitled to damages or compensation for the alleged temporary taking of their property?

Facts

The Instant Lawsuit

(1)

On January 22, 1968, after the New York City Landmarks Preservation Commission had designated Grand Central Terminal as a landmark, UGP Properties, Inc. (hereafter UGP) and Penn Central (then New York Central) entered into a lease and sublease arrangement which provides for the "demise" of the transferable development rights over Grand Central Terminal to UGP for the purpose of constructing an office building of approximately 56 stories over the Terminal and, in part, replacing portions of the landmark structure (R1872-1957).*

On July 18, 1968, the appellants applied to the Landmarks Commission for a certificate of no exterior effect for the so called Breuer I plan (Breuer referring to the architect), a speculative office tower to be cantilevered over Grand Central Terminal. This request was denied on September 20, 1968 (R13a, 25a, 2242, 331-336). On January 20, 1969, the appellants applied to the Landmarks Commission for a certificate of appropriateness either for Breuer I or for a new proposal, Breuer II (2242). Prior

* In their brief, appellants state that the lease with UGP "guaranteed" the railroad $3,000,000 a year (App.Br., p. 5). The use of the term guarantee is misleading. UGP was only a corporate shell and there was no assured source of the funds. This payment depended totally on the success of a speculative office building which would have been completed during a period when there was an extraordinary surplus of office space.

References to the Appendix to the Jurisdictional Statement will be preceded by J.S.A. References preceded by J.A. will be to the Joint Appendix. References preceded by R will be to the Record on Appeal in the Court of Appeals.

to the public hearing on the matter, it was discovered that the land on which Breuer II was proposed to be built included land over which the appellants did not have control and that Breuer II would have interfered with certain existing New York City easements (R2242-2243). Consequently appellants prepared new plans, Breuer II Revised, to avoid these problems (R1998-2002, 2252). Both versions of Breuer II involved the destruction of the southern facade of the Terminal.

On August 26, 1969, a certificate of appropriateness was denied for all of the above proposals. In its report denying the certificate, the Landmarks Commission described the public hearings, described the two proposals, and summarized the arguments that had been made (R2242-2255). It also referred to the alternatives that had been proposed for the transfer of development rights to nearby sites (R2247).*

(2)

On October 7, 1969, the appellants initiated this lawsuit seeking declaratory and injunctive relief from the Landmarks Law on its face and as applied, and "compensation" for the alleged temporary taking of their property for the period between its designation as a landmark and the requested judicial invalidation thereof (R7a-21a). A trial was held in which evidence was presented by the parties with respect to appellants' claims of hardship.

At the conclusion of the trial, the trial court, Supreme Court, New York County, found that appellants had proven economic hardship (J.S.A. 70a). The trial court relied primarily on the income and expense statements submitted by the appellants for 1969 and 1971, which showed that for those two years the revenues from the Terminal's concessions were less than the listed expenses (A57a-58a). The trial court did not attribute any value to the transfer

* The procedures for the transfer of development rights is set forth *infra*, pp. 14-16.

of the unused development rights to other properties owned by Penn Central (J.S.A. 58a).

The Appellate Division of the Supreme Court of the State of New York (two justices dissenting) reversed the Supreme Court and dismissed the complaint (J.S.A. 27a). Reported at 50 AD 2d 265, 377 N.Y.S. 2d 20 (1st Dept., 1975). The Court, citing this Court's decision in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962), found that the appellants had not demonstrated that the challenged land use regulation, enacted pursuant to an exercise of the police power, deprived them of all reasonable beneficial use of their property (J.S.A. 26a-27a). With respect to the income and expense statements of 1969 and 1971 submitted by Penn Central, the Appellate Division noted that while those statements had listed the income from the concessions only, they listed railroad operating expenses as well as expenses of the concession business. In addition, no rental value whatsoever was imputed to the vast space in the Terminal devoted to railroad purposes although that was the Terminal's principal use (J.S.A. 25a). The Appellate Division also found, *inter alia,* that the appellants had not shown that the unused development rights could not be profitably transferred to other sites (J.S.A. 25a-26a).

In its order, the Appellate Division set forth findings of fact and stated that the findings of fact made by the New York Supreme Court, accompanying the judgment appealed from, which were inconsistent with the findings of the Appellate Division, were reversed (J.S.A. 46a-50a).

The Court of Appeals of the State of New York unanimously affirmed the order of the Appellate Division (J.S.A. 15a). Reported at 42 NY 2d 324, 366 N.E. 2d 1271 (1977). In its opinion, the Court recognized the principle that government regulation would be invalid if it so restricted the use of property as to prevent the owner from realizing a reasonable return on the permitted use (J.S.A. 2a). The Court found that the appellants had not demonstrated that the subject parcel, as restricted, was incapable of earning a reasonable return (A9a, 13a). The Court stated that designation of a single landmark is not pursuant to a general community plan and thus bears some resemblance to "spot" or discriminatory zoning. But it noted that unlike such zoning, in this case there was a valid purpose (J.S.A.6a-7a). In addition, it found that Penn Central had received certain benefits. These benefits include tax exemption, subsidies which increased the value of Penn Central's Terminal Area, and valuable transfer development rights (J.S.A. 7a-9a).

The Court then applied the traditional test and found that the appellants had not established that the property is incapable of earning a reasonable rate of return when continued in the use to which it had been devoted and which use remained unaffected by its designation as a landmark (J.S.A. 10a-11a).

The Court, in concluding, stated that Penn Central could present in the New York State Supreme Court any "additional submissions which, in light of this opinion may usefully develop further the factors discussed" (J.S.A. 14a).

Grand Central Terminal.

In 1869, Cornelius Vanderbilt was authorized by the State Legislature to erect a railroad station on the site of the present Terminal.• At approximately the same time, Vanderbilt acquired additions to his surrounding railroad property so that he owned practically all of the ground area of the present day complex. The "Grand Central Depot," opened in 1871, was unexceptional and rapidly be-

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• The description in this section is taken from the report of the Landmarks Commission recommending designation of the Terminal as a landmark and from Grand Central Terminal and Rockefeller Center: *A Historic Critical Estimate of Their Significance,* by FITCH and WAITE, published by the New York State Department of Parks and Recreation, Division for Historic Preservation, 1974, pages 1-8 (hereafter, "Fitch").

came inadequate to handle the expansion of suburban and long distance railroad traffic that occurred at the end of the last century. A dangerous problem of smoke in the train tunnels developed and was solved by electrification.

In addition to eliminating the problem of smoke, electrification opened the way to a complete submergence of all the tracks and a double level track system, which permitted the accommodation of more trains without the purchase of more land. Sub-surface trackage, in turn, permitted the railroad to plan the construction of revenue producing buildings on air rights over the submerged tracks.

From its inception (it was formally opened to the public in 1913) the Terminal has been recognized not only for its architecture, but as a superb example of comprehensive urban design. It is not merely a magnificent gateway to the City, but in its system of handsome public spaces for the accommodation of passengers and in its ingenious system of connections between trains, subways and street traffic, it became "the generator of a vast concentration of new urban development" (Fitch, pp. 5-7).

A significant result of the new Terminal project was the emergence of Park Avenue as the most prestigious residential district in the nation. In covering over its trackage between 42nd and 52nd Streets, the railroad upgraded its nearby properties and recouped a large part of its investment (Fitch, p. 6). Included in the properties of the Grand Central Terminal Complex are the Barclay, Biltmore, Commodore, Roosevelt and Waldorf Astoria Hotels, the Yale Club and numerous office buildings along Park Avenue (*id.* at p. 6, J.A. 93). See also, as to the development of the Grand Central Terminal complex, New Haven Inclusion Cases, 399 U.S. 392, 438-440 (1970).•

• In their brief, appellants note that there was a plan in 1911, before the Terminal was completed, to put a twenty story office

(footnote continued on following page)

The architect for the new Terminal, Reed & Stem of St. Paul, Minnesota, selected by nationwide competition, introduced, *inter alia,* the concept of ramps. Later Whitney Warren of Warren and Wetmore took over the architectural design of the Terminal and introduced the fine Beaux Arts facade. Also of note are the scale of the monumental columns, the handsome sculptured details, the main concourse with constellations painted by Paul Helleu, and the monumental statuary group (Mercury, Hercules and Minerva) atop the 42nd Street facade (See photographs J.A. 108-110).•

As stated in *Urban Design Manhattan,* a report on the Second Regional Plan, by the Regional Plan Association (Viking Press, 1969), at p. 38:

> "The Grand Central Terminal complex built between 1903 and 1913 is the conceptual archetype of integrated multilevel development, mixed activities and direct mass transportation access. It has yet to be surpassed • • •."

On August 2, 1967, after a public hearing, the City's Landmarks Preservation Commission proposed designation (later accepted by the Board of Estimate) of the Ter-

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(footnote continued from preceding page)

tower over the Terminal building. This plan was discarded; plans were filed and a certificate of occupancy obtained only for the existing building (R28-29). It is clear from the drawing that the 1911 plan was for a tower of a size and style compatible with that of the Terminal and cannot be compared to the huge slab office towers of over 50 stories proposed by the appellants and rejected by the Landmarks Commission. The appellants did not seek a certificate of appropriateness from the Landmarks Commission to build anything remotely resembling the contours of the 1911 plan.

• The reproductions of the photographs of Grand Central Terminal in the Joint Appendix do not properly show the building. The actual photographs showing the building are contained in the Record on Appeal in the Court of Appeals on file with this Court. The pictures appear at pages 2232 through 2238.

minal as a landmark (R2240-2241). In its report, it stated, *inter alia* (R2240):

> "Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style it represents the best of the French Beaux Arts."

Historic Preservation Legislation

In recent years, municipalities throughout the world have become increasingly concerned with the preservation of buildings and sites which have historical, aesthetic or cultural significance. Jacob H. Morrison, *Historic Preservation Law,* 1972 Supplement, pp. i-ii. See also, Rohan, *Zoning and Land Use Controls,* Vol. 2, Section 7.01, at pages 7-2 through 7-9; Ashworth, *Contemporary Developments in British Preservation Law and Practice,* 36 Law § Cont. Prob. 348 (1971). This heightened recognition of the public interest in the value of man's handiwork, particularly in urban areas, has resulted in legislation, at all levels of government, aimed at preserving our historical and cultural heritage.

A. Federal legislation on historic preservation.

Since 1966 Congress has passed major new laws furthering historic preservation. For a detailed review of this legislation as of 1971, see Gray, *The Response of Federal Legislation to Historic Preservation,* 36 Law § Cont. Prob. 314-328 (1971).

In the National Historic Preservation Act of 1966, Congress found and declared "that the historical and cultural foundations of the nation should be preserved as a living

part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b).

The Act provides for an expanded National Register of Historic Places* (first provided for in the Historic Sites Act of 1935); state grants-in-aid; grants-in-aid for the National Trust for Historic Preservation, which had been chartered by Congress in 1949; and the establishment of the Advisory Council on Historic Preservation with, *inter alia,* advisory powers respecting protection of National Register properties from undertakings involving federal participation. 16 U.S.C. §§ 470(a)(1), 470(a)(2), 470(g), (j), (i).

The 1969 National Environmental Policy Act (NEPA) makes historic preservation an integral part of our national environmental goals and it provides elaborate procedural machinery for assuring that federal agencies incorporate these goals in their planning. 42 U.S.C. §§ 4321, 4331(b)(4).

In the housing area, HUD has been authorized to provide grant assistance for historic preservation purposes and the Emergency Home Assistance Act provides mortgage loan guarantees where the loans are made "for the purpose of financing the preservation of historic [residential] structures." 12 U.S.C. § 1703; 16 U.S.C. § 470b-1; 42 U.S.C. § 1500-1. See also the Historical and Archeological Preservation Act. 16 U.S.C. § 469.

In the transportation field, Congress again declared it to be national policy that special efforts be made to preserve historic sites and required that the Secretary of Transportation disapprove any project which requires the use of any federal, state or local historic sites or parkland unless there is no feasible and prudent alternative and

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* On January 17, 1975, Grand Central Terminal was listed on the National Register of Historic Places and was designated a national historic landmark.

such project includes "all possible planning to minimize harm" to the site. 49 U.S.C. § 1653(g). See *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 412-413 (1971), where this Court, in construing this section as applied to parklands, said that "preservation must be given paramount importance."

The Urban Transportation Act of 1970 requires that planning for mass transportation projects include consideration of their effects on "historical and cultural assets." 49 U.S.C. § 1610. The Amtrak Improvement Act of 1974 seeks to encourage the preservation of passenger railroad terminals of historic significance and architectural quality. It authorizes the Secretary of Transportation to provide financial and other assistance for purposes of promoting the conversion of terminals to "inter-modal" transportation centers and civic and cultural activity centers where the terminal is listed on the National Register and its architectural integrity will be preserved in such a conversion; and it provides that funds for such purposes be expended in the manner most likely to maximize the preservation of terminals of historic significance. 49 U.S.C. § 1653 (i)(1), (2), (3), (4). It also directs that the "National Railroad Passenger Corporation shall give preference to using station facilities that would preserve buildings of historical and architectural significance." 49 U.S.C. § 1653(i)(6).

B. The law on historic preservation in states and localities.

Since the 1950's, encouraged in part by federal programs, there has been extraordinary growth of state and local legislation for the preservation of landmarks and historic districts, which legislation has been upheld overwhelmingly when tested in the courts. See generally Jacob H. Morrison, *Historic Preservation Law* (1965 and 1972 Supplement). By 1965, 51 cities and every state had enacted some form of historic preservation law; and as of 1976

there were over 500 landmark and historic district commissions throughout the United States. For cases upholding preservation laws, see for example, *Maher* v. *City of New Orleans,* 371 F. Supp. 653 (E.D. La., 1974), affd. 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976); *Matter of Trustees of Sailors' Snug Harbor* v. *Platt,* 29 AD 2d 376, 288 N.Y.S. 2d 314 (1st Dept., 1968); *First Presbyterian Church of York* v. *City Council of the City of York,* 25 Pa. C. 154, 360 A. 2d 257 (Commonwealth Ct. of Pa., 1976); *Figarsky* v. *Historic District Commission of the City of Norwich,* 171 Conn. 198, 368 A. 2d 163 (1976); *Lafayette Park Baptist Church* v. *Scott,* 553 S.W. 2d 856 (Mo. Ct. of App., 1977); *Rebman* v. *City of Springfield,* 111 Ill. App. 2d 430, 250 N.E. 2d 282 (1969); *Opinion of the Justices to the Senate,* 333 Mass. 773, 783, 128 N.E. 2d 557, 564 (1955); *City of Santa Fe* v. *Gamble-Skogmo, Inc.,* 73 N.M. 410, 389 P. 2d 13 (1964); *Town of Deering ex rel. Bittenbender* v. *Tibbetts,* 105 N.H. 481, 202 A. 2d 232 (1964). See also *City of St. Paul* v. *Chicago, St. P., M.&O. Ry. Co.,* 413 F. 2d 762 (8th Cir., 1969), cert. den. 396 U.S. 985 (1969); *Benenson* v. *United States,* 548 F. 2d 939, 949 (Ct. Cl., 1977).

C. Landmarks Preservation in New York City.

The preservation of landmarks in urban areas is of special importance. In New York City, the need is urgent. The intensity of commercial development in Manhattan's central business district is unique in the world. Unlike other cities, most of the activities in which the New York area plays a major role (finance, insurance, corporate headquarters, communications, foreign trade, wholesaling, apparel, printing, nonprofit organizations, culture and entertainment) are of a kind which locate primarily in the center of the City, *Urban Design Manhattan.* A report by the Regional Plan Association (Viking Press, 1969), pp. 6, 13.

The economic and cultural life of the area is greatly affected by the quality of its physical environment (*id.,*

p. 26). The Regional Plan Association observed (*id.*, p. 17): "We believe that, increasingly the success of the Manhattan Central District will depend on people's ability to move freely and comfortably within it and to enjoy the experience of being there." The importance of Grand Central Terminal as exemplifying the integration of transportation with a variety of mixed activities in a technically sound way has been emphasized by the Regional Plan Association (at pages 38, 40-41, 70-71 *et passim*). As stated by the Association (at p. 110):

> "The historic and cultural heritage of the City must be not only saved from demolition but incorporated into future development proposals. This preservation of landmark buildings is imperative to bond the present with the past, thereby forming a continuity which will complement the old while we build for the future."

(1)

In 1956, the State of New York, in accordance with the nationwide trend, passed the Historic Preservation Act, specifically enabling municipalities to provide for the protection of places, buildings and works of art "having a special character or special historical or aesthetic interest or value." Formerly General City Law, § 20 (25a), now McKinney's General Municipal Law, § 96-a.

In 1965, New York City provided for a comprehensive program for landmark preservation by adding Section 2004 to the New York City Charter, and Chapter 8-A (Sections 205-1.0 et seq.) to the Administrative Code of the City of New York (J.S.A. 76a-112a). Section 205-1.0 of the Code set forth the purpose and public policy behind

the enactment (J.S.A. 76a). The City Council set forth its findings and declared as a matter of policy that the "protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity required in the interest of the health, prosperity, safety and welfare of the people" (J.S.A. 76a).

Section 2004 of the New York City Charter establishes a Landmarks Preservation Commission composed of eleven members, including "at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor"; also the membership shall include at least one resident of each of the five boroughs."

It is the Commission's task, after public hearing, to designate landmark properties and historic districts. Admin. Code § 207-2.0 (J.S.A. 84a). The Board of Estimate is to approve, disapprove or modify the designation, but, before it does so, the designation must be integrated with the master plan governing land use in the city, i.e., the secretary of the Board "shall refer such designation or amendment thereof to the City Planning Commission, which within thirty days after such referral, shall submit to such board a report with respect to the relation of such designation or amendment thereof to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved." Admin. Code § 207-2.0(g)(1) (J.S.A. 85a).

Pursuant to this procedure, the Landmarks Commission has designated more than five hundred landmarks and thirty-one historic districts throughout the City of New York.

Once a landmark is designated, the ordinance requires that those in charge of it keep "it in good repair." Section 207-10.0 (J.S.A. 104a). In addition, the Commission is authorized to regulate construction, reconstruction, al-

teration and demolition on a landmark site. Section 207-4.0 (J.S.A. 88a). Comprehensive procedures are provided where one wishes to make changes. A landmark owner may seek a "certificate of no exterior effect" or, if there will be exterior effect, a "certificate of appropriateness." Sections 207-5.0-207-7.0 (J.S.A. 90a-93a). As to taxpaying commercial properties, there is also a procedure for seeking a certificate of appropriateness authorizing demolition on the ground of insufficient return where tax relief or other aid fails to afford the owner a reasonable return on the value of his property for continued use as restricted by law. A similar procedure, providing for different forms of relief, is available to certain tax-exempt properties used for charitable purposes. Section 207-8.0 (J.S.A. 94a).

(2)

Integrated with the Landmarks Law are certain amendments to the New York City Zoning Resolution which permit the transfer of unused development rights over landmark properties located in higher density areas of the City, to other nearby sites. Zoning Resolution, Sections 74-79 to 74-793 (J.S.A. 113a-118a).

The City Planning Commission's report (CP-20253), dated May 1, 1968, in support of the original transfer amendments, stated:

> "We anticipate that the proposed amendments will have multiple benefits. The owner of a designated landmark can realize an economic gain by selling his unbuilt, but allowable development rights; the buyer of these rights, in return, can acquire additional floor use he would otherwise not have; the neighborhood, meanwhile can retain an essential amenity, a revitalized landmark, plus new development harmonious with the character of the area * * *."

The original May 1968 transfer provisions authorized the City Planning Commission to grant a special permit for

the transfer of development rights to adjacent sites which included sites adjacent but for streets or street intersections. Also, as originally enacted, the maximum amount of floor area that could be transferred was the basic maximum allowable floor area on the zoning lot in excess of that already developed of all the buildings on the landmark lot (in effect, the total unused development rights), but the permitted floor area increase in any recipient lot was limited to 20% of the floor area otherwise permitted on the recipient site. Common ownership was not necessary.

In December 1969, Sections 74-79 et seq. of the Zoning Resolution were amended to increase the availability of transfers of development rights from landmark properties. In central business districts, the 20% limitation as to recipient lots was removed (J.S.A. 113a). In addition, in such districts, the definition of an "adjacent lot," i.e., a recipient lot, was expanded to mean a lot contiguous or one which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to a lot occupied by the landmark building. All such lots shall be in the same ownership [as defined in Section 12-10]. Penn Central has a significant number of properties in the Grand Central Terminal area which come within this definition (see Pltfs. Exh. 10 at J.A. 93).

Section 74-79, from its inception in 1968, has required an application for a special permit for transfer to include a site plan of the landmark lot and the adjacent lot, including plans for all development on the adjacent lot; a program for the continuing maintenance of the landmark; and such other information as may be required by the City Planning Commission. As a condition for such permits, the City Planning Commission must find (a) that the transfer will not unduly increase the bulk of any new development, density of population or intensity of use in any block, to the detriment of nearby blocks and (b) "that the program for continuing maintenance will result in the

preservation of the landmark" 74-792 (J.S.A. 115a). The City Planning Commission is authorized to prescribe, in order to ensure that the transfer is in accordance with the plan, "appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area" (J.S.A. 117a).

Summary of Argument

(1)

The appellants, without any analysis, have argued that the City of New York, in applying the Landmarks Law to Grand Central Terminal, has taken their property and must pay the appellants compensation because they have been denied the most profitable use of their property. It is our position that the designation of Grand Central Terminal as a landmark was a proper exercise of the police power. Since the appellants did not establish that the property, as restricted, was not economically viable, the complaint was properly dismissed.

This Court has noted that, in the exercise of the police power, a state has broad power to respond to emerging economic and social problems. See *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The power in restricting land use has been extended to legislation for aesthetic and other similar purposes having to do with the quality of life. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 5-6 (1974).

Where the land use regulation is within the police power, the validity of the regulation will depend on an examination and balancing of three elements: the importance of the regulation to the public good, the reasonableness with which the regulation attempts to achieve that good and whether the restriction on the parcel renders it economically unviable. These three considerations were set forth by this Court in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 593-594 (1962).

With respect to the first consideration, as we stated above, land use regulation for aesthetic and other similar purposes, is included within the police power. The landmarks law satisfies the second element. It is reasonable in light of the purpose to be achieved. The only method to preserve landmarks is to prohibit their owners from destroying them without permission.

The remaining criteria is the impact on the particular parcel. On this consideration, the plaintiff, to succeed in attacking a land use regulation, must demonstrate that the regulation deprives him of all reasonable use of the property. See *Goldblatt, supra,* 369 U.S. 590.

This standard has been applied to owners of property in historic districts who attack land use regulations prohibiting the destruction of their property within the district. See *Maher* v. *New Orleans,* 516 F. 2d 1051, 1066 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976).

The appellants do not dispute the application of this test to buildings in historic districts. They object to the application of this test to their building on the ground that it is not part of a district. It is our position that appellants' argument misapprehends the purpose of landmarks legislation in New York City. In New York City, the landmark scheme directly relates to all aspects of life in the City and all property owners participate in the benefits gained. Individual designations are part of a comprehensive scheme to preserve historic properties throughout the entire City. The Landmarks Commission has designated over 500 buildings and thirty-one historic districts. After a building is designated, the designation must be submitted to the City Planning Commission which must submit a report to the Board of Estimate with respect to the relation of such designation to the master plan and the zoning resolution. After receipt of the report the Board of Estimate may approve, disapprove or modify such designation. New York City Administrative Code § 207-2.0(g)(1) (J.S.A. 85a).

This overall scheme distinguishes landmarks designation from a zoning case involving discriminatory or "spot" zoning.

Appellants' property is being treated similarly to any other owner of property which has been designated as a landmark. Appellants would be entitled to relief if they could establish that the property was not economically viable. At trial Penn Central argued that it had lost money in running the Terminal. In support of its position, Penn Central submitted a statement of Revenues and Costs for Grand Central Terminal for 1969 and 1972. In these statements Penn Central did not include the value of owner-occupied space in the Terminal used by the Railroad for railroad purposes (the appellants do not dispute Penn Central's need for a Terminal), offices, storage and employee amenities. The revenues included only rents from the concessions. In contrast, in the costs portion of the statements the appellants included the expenses of the entire Terminal, not distinguishing between those expenses incident to real estate operations and those incident to railroad operations. In addition, the appellants did not attribute any value to the transfer development rights. At trial, the evidence showed that the air rights had substantial value.

The Appellate Division, in reversing the Supreme Court, reversed the trial court's findings of fact and, in its own findings, found that the "Statement of Revenue and Costs" had improperly failed to impute rental value and had improperly attributed railroad operating expenses to its real estate operations (J.S.A. 49a-50a). The Appellate Division also found that the appellants did not establish that the air rights could not have been profitably transferred to other sites (J.S.A. 49a). These findings were confirmed by the Court of Appeals.

The appellants' entire brief is devoted to the decision of the Court of Appeals. It urges that the New York

Court of Appeals established new concepts in eminent domain. The Court of Appeals specifically rejected the application of principles applicable to a taking in eminent domain to this case (J.S.A. 5a). The Court of Appeals, in its opinion, assumed that the traditional police power test would apply to the designation of an individual landmark. The Court stated that, unlike buildings in historic districts, individual landmarks are not part of a comprehensive plan and the designation imposes burdens on the owner without benefits. The Court then noted that in a particular case there may be sufficient benefits to bring such a restriction within the proper exercise of the police power. Those benefits here included the tax exemption, the valuable transfer development rights, and that portion of the value of the Terminal which has been created by public contribution. The Court reasoned that these benefits justified applying the police power test applicable to all land use regulations. The Court, in applying the test, concluded that the appellants had failed to sustain their burden of proof.

The Court considered the special benefits because it did not see individual designations as being pursuant to a comprehensive plan. It is our position that on this point, the Court erred. As we noted above, the designation of each individual landmark is part of a comprehensive plan to preserve all historic buildings throughout the City which in turn is integrated into the general community plan.

Even if the single designation cannot be considered as part of a general plan, the Court of Appeals only considered the special benefits to Grand Central Terminal to enable it to apply the traditional test. Those benefits place Grand Central in the same position as an owner of a property in an historic district. If he can show economic hardship, he is entitled to obtain relief. In this case, the New York State appellate courts, in findings not contested by appellant, indicated that the appellants had failed to meet that burden.

(2)

Assuming, arguendo, that the Landmarks Law is invalid as applied to Grand Central Terminal, the appellants are not entitled to damages. There can be no cause of action for an inverse condemnation. The Landmarks Law in this case was enacted pursuant to the police power. Condemnation of Grand Central Terminal, for public ownership, would require compliance with the procedures set forth in the New York City Administrative Code, Section B15-1.0 *et seq.* Nor has there been a de facto taking. There has been no physical invasion of the land or other official action interfering with the appellants' use of its property sufficient to constitute a taking.

The appellants do not have a claim for damages. The invalidation of a police power regulation does not entitle the property owner to damages. See, e.g., *Veling* v. *Ramsey,* 94 N.J. Sup. 459, 228 A. 2d 873, 874 (1976). Municipalities must be free to exercise the police power. To require municipalities to be liable in damages for an improper exercise of the police power, would impair their power to perform a vital governmental function.

ARGUMENT

I The complaint was properly dismissed. The New York City Landmarks Law, as applied to Grand Central Terminal, did not deprive the owner of due process. The owner failed to show that the landmark designation interfered with continued use of the Terminal or prevented it from earning a reasonable rate of return.

(1)

Appellants in their brief specifically concede that a landmarks law is a proper subject for the exercise of the police power (App. Br., pp. 12, 22-23). The appellants contend, however, that in applying a landmarks law to

Grand Central Terminal, the appellees should be required to pay them compensation because the appellants have been denied the most profitable use of their property. This position that there was a taking because of a de facto condemnation is urged upon this Court without any attempt by appellants to show that the subject property as restricted is not economically viable. In support of that argument, appellants divide the landmark parcel into two parts, the Terminal itself and the air rights over the Terminal (App. Br., pp. 9, 11, 24, 26). Their argument appears to be that the City, in the application of the Landmarks Law, has "taken" the air rights above the Terminal, a separate and distinct property, without paying just compensation. This attempt to divide the regulated property into two distinct parts is contrary to traditional property law. The right to develop above one's property is one of the bundle of rights which inhere in all property ownership. It is noteworthy that in traditional zoning and historic district regulation, the very same "taking" would occur. In those instances, it has been held that there is no taking. See *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Gorieb* v. *Fox,* 274 U.S. 603 (1927); *Maher* v. *City of New Orleans,* 516 F.2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976). For, in all land use regulation, there is not a separate calculation on the reasonableness of the return on each right in the bundle, but instead an assessment of the reasonableness of the total return on the property as a whole. Thus, appellants' statement on page 24 that the "economic return to Penn Central from the Terminal" is "immaterial in deciding whether or not there has been a taking of the Terminal air rights by operation of the Landmarks Law" is incorrect.

It is our position that appellants have improperly confused the principles of eminent domain, which they incorrectly urge were applied by the New York Court of Appeals, with principles governing a lawful exercise of the police power. As set forth below, the designation of

Grand Central Terminal was a proper exercise of the police power. Since appellants failed to establish at a trial that the property, as restricted, was not economically viable, dismissal of the complaint was proper pursuant to traditional standards of land use regulation.

(2)

This Court has established a substantial body of precedent setting forth the appropriate criteria for determining whether a land use regulation is a valid exercise of the police power. In *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court, in sustaining a zoning ordinance, stated that it would not find such ordinance to be outside the scope of the police power unless its provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at p. 395. In its opinion, this Court further recognized that a State legislature has flexible power to respond to unique economic and cultural problems, particularly those arising from the vast changes in the extent and the complexity of the problems of modern city life. 272 U.S. at pp. 386-387. See also, *Young* v. *American Mini Theatres*, 427 U.S. 50, 71-72 (1970); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Gorieb* v. *Fox*, 274 U.S. 603, 610 (1927). The police power, in a land use context, has been extended to the promotion of general community development, which includes legislation for aesthetics and other purposes affecting the quality of life. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 5-6 (1974). See also *Berman* v. *Parker*, 348 U.S. 26, 31-33 (1954).

Where the land use regulation is within the police power, the burden is on plaintiff to establish that the line separating valid regulation from confiscation has been breached. In meeting this burden, it is insufficient to show that the regulation has deprived the property owner of the most profitable use of his property. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 592-593 (1962); *Hadacheck* v. *Sebastian*, 239 U.S. 394, 405 (1915). See also *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414-416 (1922).

The cases cited above indicate that a determination of whether the land use regulation is valid will depend on an examination and balancing of three elements: the importance of the regulation to the public good; the reasonableness with which the regulation attempts to achieve that good; and how substantially the regulation affects the economic viability of the particular parcel.

In *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595 (1962), this Court set forth these considerations as providing the test of constitutionality of an ordinance regulating land use by prohibiting excavation below the water table. Preliminarily, the Court found that although the ordinance completely prohibited the continued operation of the plaintiffs' sand and gravel mine and deprived the property of its most beneficial use, this did not make it unconstitutional (pp. 592-593, 596). Nor did constitutionality hinge on whether the use prohibited was a common law nuisance (p. 593). In applying the test as to the importance of the regulation for the general welfare of the community, this Court concluded that the plaintiff had failed to meet its burden of presenting evidence sufficient to overcome the presumption of constitutionality. 369 U.S. at p. 596.

As we noted above, citing cases, land use regulation for aesthetic purposes has been recognized by this Court as of vital importance to the welfare of the community and within the police power of state legislatures. More than this, as we have shown earlier, at all levels of government there has been an increasing awareness of the need to preserve our cultural heritage, represented in part by our landmark buildings and historic districts. It has been recognized that such preservation is directly related to the economic and cultural vitality of the City.

The second consideration is whether the restrictions are reasonable in light of the public purpose to be achieved. In *Goldblatt* v. *Town of Hempstead, supra*, 369 U.S. at p. 595,

this Court referred to "the availability and effectiveness of other less drastic protective steps" as a prime test for determining the reasonableness of the regulation. Here, since the public purpose is to preserve landmarks, preservation can only be accomplished by requiring that the landmarks not be destroyed or altered without permission.

The remaining criterion is the impact of the regulation upon the parcel's economic viability. Under the decisions of this Court, *Goldblatt, supra,* 369 U.S. 590, *Hadacheck, supra,* 239 U.S. 394 and *Pennsylvania Coal, supra,* 260 U.S. 393, the plaintiff, to succeed in attacking a Landmarks Law as an unconstitutional deprivation of property, must demonstrate that the law, as applied to the subject parcel, deprives him of all reasonable economic use of the property.

This standard was applied in *Maher* v. *New Orleans,* 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976), which involved the power of the City of New Orleans to enact an architectural control ordinance applicable to the historic French Quarter of New Orleans. In upholding the ordinance, the Court of Appeals found that the plaintiff was not entitled to relief because he could not demonstrate that the subject property, as restricted, could not yield a reasonable rate of return. 516 F. 2d at p. 1066.

See *First Presbyterian Church of York* v. *City Council of the City of New York,* 25 Pa. Co. 154, 360 A. 2d 257, 260-261 (Comm. Ct. of Pa., 1976); *Figarsky* v. *Historic District Commission of the City of Norwich,* 171 Conn. 198, 368 A. 2d 163 (1976), where the Courts, in applying similiar tests, upheld denial of demolition permits. See also, *Lafayette Park Baptist Church* v. *Scott,* 553 S.W. 2d 856, 862-863 (Mo. Ct. of App. 1977).

As we will show *infra,* pp. 27-33, the state appellate courts properly found in the instant case that the appellants had not demonstrated that the Terminal, as restricted by the Landmarks Law, is incapable of earning a reasonable rate

of return upon its value for the use to which it has been continuously devoted, and which use is unaffected by designation as a landmark.

(3)

It is noteworthy that appellants do not dispute the application of the three-fold test, including the requirement that a plaintiff demonstrate that the property, as restricted, is not economically viable, to individual parcels located within designated historic districts (App. Br., pp. 22-23). They object to the use of the test only when an individual building, outside of a district, is designated as a landmark. In such a case, appellants contend that a state should only be allowed to restrict the use of property if it pays compensation to the owner. This attempt to treat buildings of unique historic, cultural or aesthetic character differently, depending on whether they are sufficiently contiguous to be classified as a district, or sufficiently separated to require individual designations for a city-wide classification, does no more than place form over substance and represents a misapprehension of the purpose of landmarks legislation.

As we discussed in an earlier part of our brief, landmarks preservation is necessary to the general welfare of the people, particularly in New York City where the economic and cultural life of a densely populated metropolis is strongly affected by the quality of its physical environment. The more successful a landmarks law is in preserving the urban environment as an attractive place to live, the more it will contribute to the preservation of the City's quality as a center of communication, finance, and transportation. The landmarks scheme directly relates to all aspects of life in the City and all property owners participate in the benefits gained.

Appellants' parcel of land has not been "singled out" for discriminatory regulation. The individual designations under the New York City Law are part of a general com-

munity plan to preserve historic properties throughout the entire city. The landmarks legislation contemplates that designations will continue to be made (Section 207-2.0, subd. i, J.S.A. 86a). Each designation must be forwarded to the City Planning Commission, which must submit a report to the Board of Estimate with respect to the relation of such designation to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved. New York City Admin. Code § 207-2.0(g)(1) (J.S.A. 85a). As a result, the landmarks preservation program is part of a general land use plan for the entire city. The law sets forth specific criteria which must be met for designation. The Landmarks Commission has designated over 500 buildings and thirty-one historic districts throughout the five boroughs of New York City, all of them contributing to the vitality of the city in which appellants own property. If a landowner believes that the designation is improper, he may challenge the designation whether or not the property is in an historic district and will be entitled to relief if he can show that the property is not economically viable or that the designation is unreasonable.

It may well be that the burdens of landmarks regulation are not equal and the benefits are not exactly proportionate to the burdens, but that is also true of all land use regulation, including zoning, which does not impose uniform restraints and reciprocal benefits. In a large number of land use regulation cases in which the owner of the restricted property unsuccessfully challenged the regulation, it was recognized that the burdens to the owner were greater than the benefits. See *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) (zoning); *Queenside Hills Realty* v. *Saxl,* 328 U.S. 80 (1946) (requirement of a sprinkler system); *Maher* v. *The City of New Orleans,* 516 F. 2d 1051 (5th Cir. 1975) (historic district regulation); *Construction Ind. Assn., Sonoma Cty.* v. *City of Petaluma,* 522 F.2d 897 (9th Cir., 1975), cert. den. 424 U.S. 934 (1976) (moratorium on residential development) and *Cromwell* v.

Ferrier, 19 N Y 2d 263, 225 N. E. 2d 749 (1967) (billboards).

The designation of an individual landmark is not analogous to spot zoning. Spot zoning is unplanned land use regulation which results in an arbitrary or unreasonable devotion of a small area so zoned or rezoned to uses inconsistent with those to which the rest of the district is restricted. See *Rodgers* v. *Village of Tarrytown,* 302 N.Y. 115, 123, 96 N.E. 2d 731, 734 (1951); *City & County of Denver* v. *Denver Buick,* 141 Col. 121, 347 P. 2d 919 (Col. 1959); *Rathkopf, The Law of Zoning & Planning* §§ 26.01-26.03. It is the overall scheme of the Landmarks Law which distinguishes this case from cases involving spot zoning. The designation of Grand Central Terminal is pursuant to general plan. It is related to the preservation of other structures which, taken all together, maintain the attractive quality of the City. It is not unreasonable to distinguish historic properties from the unhistoric. This distinction, in which pursuant to a general plan historic buildings are treated differently from buildings which are not landmarks, bears a rational relationship to a legitimate state interest. See *City of New Orleans* v. *Dukes,* 427 U.S. 297 303-305 (1976); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 7-8 (1974); *Construction Ind. Assn, Sonoma Cty.* v. *City of Petaluma,* 522 F. 2d 897, 906 (9th Cir., 1975) cert. den. 424 U.S. 934 (1976).

In sum, appellants' property is being regulated pursuant to the same legislative scheme affecting hundreds of other landmark parcels in this City. As indicated above, appellants were entitled to avoid regulation by establishing that the property, as restricted, was not economically viable. In this case, the state courts found that appellants failed to meet that burden.

(4)

At the trial, Penn Central argued that it was suffering an operating loss in running the Terminal. The basis for

Penn Central's claim is a "Statement of Revenues and costs" for Grand Central Terminal for 1971 and a similar statement for 1969 (J.A. 100-104). These statements were prepared specifically for this litigation (J.A. 61, 62, 65). In these statements, "Grand Central Terminal" includes the station building and the subsurface area, including platforms (J.A. 61).

The state appellate courts found that the first significant legal error in the statements occurred in Penn Central's treatment of "Revenues." It is fundamental that the rental value of an improvement must include the imputed value of the owner-occupied space. See *Matter of Seagram & Sons* v. *Tax Comm.*, 14 NY 2d 314, 200 N.E. 2d 447 (1964). But Penn Central included under "Revenues" only the rents received from the Terminal's commercial tenants and concessionaires (J.A. 61). Thus the total revenue figure of $3,174,257 includes rentals for what is only a portion of the Terminal's total space. It does not include any rental value for those portions of the Terminal used by the railroad for offices, storage and employee amenities (J.A. 64). More important, the "Revenues" figure does not include any rental value for the vast bulk of space in the Terminal which is used for railroad purposes.* Where rental value for a building's principal use is altogether omitted, such "study" as to its economic viability is obviously of little probative value. The reasonable rental value of the space used by a railroad in passenger business as a terminal cannot properly be deleted from any meaningful analysis of the property's capacity to yield a reasonable return.

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* Appellants in their brief suggest that the Terminal is physically deteriorating (App. Br., p. 1). To the contrary, any visitor to the station would be aware that the physical structure of the Terminal has been substantially upgraded in recent years. The Terminal serves thirty thousand commuters daily with additional hundreds of thousands of persons, who use the City's subway system, passing through the Terminal, Fitch, p. 6.

The magnitude and significance of the error made by the appellants in the New York Supreme Court can be readily seen. The space devoted to railroad use, and leased to a governmental agency, which operates the service is vast. It includes the main concourse; the tracks and platforms; connecting areas on the main concourse level and on the various subsurface levels; the lower level concourse; the areas used for the sale of tickets; the areas used by the various workers involved in the Terminal (e.g. the station master and his staff). All of this enormous space, containing massive railroad facilities and improvements, was neglected by Penn Central, as if it did not exist. It may be noted that the assessed valuation of the transportation portions of the Terminal is approximately double the assessed valuation of those portions of the Terminal devoted to commercial and concession use (J.A. 91), and rents from commercial and concession use exceeded three million dollars a year (J.A. 102).

With respect to the appellants' list of "Costs of Maintenance and Operation," the appellants failed to distinguish between expenses incident to real estate operations and those incident to railroad operations. Thus although "Revenues" were limited to values generated by the commercial and concession use of the Terminal, the "cost" items were not so limited (J.A. 64-65, 66, 100-104).

Appellants attributed to the Terminal building not just those expenses which could be considered expenses of maintaining the real estate, but all of their expenses in operating a railroad terminal. Mr. Milano, regional controller of the metropolitan region of Penn Central, who testified about the expenses listed on the "Statement of Revenues and Costs," admitted that the $1,141,679 listed for "maintenance, repairs and service plant operation," the largest single cost item, referred to costs of the entire terminal operation, as did the $632,753 listed for "cleaning," the $438,566 for "policing" and the $69,485 for "other direct costs" (rubbish removal *et alia*) (*id.*). This

would also be true of the "materials and supplies" ($69,692) used in "maintenance," the "utilities" ($660,710), and the "supervision of maintenance" ($205,029).

In addition, "track cleaning" ($57,188), "supervision" of track cleaning ($5,816), and general administrative expenses ($350,301) (which refer to such things as the salaries of the general manager of the railroad and his staff and accounting costs) are not properly attributable in any degree to operations of the Terminal alone. They are expenses of the entire business (J.A. 64-65, R945, 947-948).

Of the total expenses of $5,076,724, the only cost that is clearly attributable solely to the real estate and not in whole or in part to the business is the $598,494 for "real estate taxes." Other items of expense such as "Gross earning taxes", "track cleaning", "supervision of track cleaning," "depreciation" and "general administrative expenses" of the railroad are not attributable in any part to the costs of running the building. These total $812,805. As for all the other expenses for maintenance and so on, appellants can properly list as expenses only that portion which is attributable to the operation of the real estate and not to the operations of their business. As with their error in computing rentals, the record is completely inaccurate. They made no attempt whatever to make the necessary allocation. The appellate courts properly found that there was a total failure of proof in the appellants' attempt to establish economic hardship based on the income and expense statements.

In addition, appellants did not establish that the unused transfer rights over the Terminal could not have profitably transferred to other sites. To the contrary, at the trial it was shown that, in appropriate cases, transfer rights have substantial value. Thirty thousand square feet of development rights had been transferred from Amster Yard, a landmark in mid-town Manhattan to a site on the same block. Such a transfer permits construction of a larger

building on the receiving site. The transfer was effected at a price of approximately $494,000 (R1206-1209).

Both Penn Central and UGP had acknowledged by their actions that the transfer rights from the landmark site to an adjacent site constituted a valuable asset, which could be the subject to a sale.

In 1969 UGP had its architect, Marcel Breuer, prepare schematic plans for an office building on the site of the Biltmore Hotel which would be of equivalent size to the proposed towers over Grand Central Terminal. The plans for such a building had reached a stage "comparable to" the plans for the proposed towers (J.A. 36-37). The Biltmore Hotel was to be demolished, approximately 1.3 million square feet of development rights transferred to the site and a building of 2.1 million square feet was to be constructed (J.A. 37, 73-74). The remaining unused development rights would have been available to Penn Central to transfer to other sites.

The 1969 amendments to the Zoning Resolution were expressly intended to expand the number of sites that could receive transfers of development rights from the Grand Central Terminal site (J.A. 68-69). Although there was disagreement in the testimony as to whether the developer had agreed to apply for a transfer once the amendment was enacted (as testified to by Jacquelin Robertson, the Director of the Office of Midtown Planning and Development, J.A. 73-74) or agreed only to seriously consider such an application (as testified to by Murray Drabkin of UGP (J.A. 38-39), it is undisputed that virtually all of the details as to such application had been worked out with the City Planning Commission and that the Commission was ready to proceed with the required public hearing (J.A. 70-71, 75-76, 77).

The evidence also indicated that, in late 1970 and 1971, UGP and Penn Central negotiated for a lease on the Biltmore site and a transfer of air rights from the land-

mark parcel to the Biltmore site. UGP's offer of $3.8 million in annual rent was turned down by Penn Central which was asking for $5 million (J.A. 33-35). That the economic value of the air rights above the Terminal were being preserved, is thus clearly apparent from the record proof. When Penn Central offered its midtown properties for sale in 1971, UGP placed two alternative bids, one for the Grand Central Terminal air rights together with the fee in the Biltmore site and one for the air rights plus the fee in the Roosevelt Hotel site. It offered $11.7 million for the Biltmore, plus $3.5 million for the air rights (J.A. 47-49). Although these bids were rejected by Penn Central, they evidence UGP's view of the economic feasibility of both proposals.*

In their brief, without referring to any evidence submitted at the trial, the appellants argue that the value of the air rights is minimal because of the procedures necessary to obtain approval of the transfer (App. Br., pp. 40-41). A transfer of development rights is required to be approved by the New York City Planning Commission and the Board of Estimate. In this case the City Planning Commission, which, in cooperation with the appellants, had developed a plan to amend the Zoning Resolution to benefit Grand Central Terminal, and the Board of Estimate were prepared to proceed expeditiously. At no time in the course of trial or an appeal in the state courts, did the appellants seriously question that, in fact, such approval was almost certainly forthcoming.

The evidence offered by the appellants in support of their argument of economic hardship, relating to the air rights and the statement of revenues and expenses was carefully reviewed by the State appellate courts. The Appellate Division, in its order dismissing the complaint found that

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* Interest in the development rights was also expressed by two major real estate developers in New York City, Harry Helmsley and Goldman-DiLorenzo (J.A. 77, 86-87).

the appellants had failed to show that the unused development rights could not have been profitably transferred to one or more nearby sites (J.S.A. 49a). In presenting their proof of alleged hardship the appellants had ascribed no value to the development rights (*id.*). The Appellate Division also found that the statement of revenues and expenses failed to impute any rental value for the part of the Terminal used for railroad purposes and that the statement improperly attributed a considerable amount of their operating expenses to real estate operations (J.S.A. 49a-50a).* These findings of fact were affirmed by the New York Court of Appeals.

(5)

The appellants' entire brief is devoted to an analysis of the decision of the New York Court of Appeals which it characterizes as having fashioned special rules in permitting the City to designate Grand Central Terminal without the payment of just compensation (see particularly, App. Br., pp. 9, 20-23). The appellants' brief assumes that this is a "taking" case involving the principles of eminent domain and that the only issue is whether the Court of Appeals, instead of awarding the appellants just compensation, approved of a lesser standard of fair compensation in cases involving historic buildings. There is nothing in the opinion of the Court of Appeals to support

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* In their brief appellants (p. 8, fn. 7) state that, in the New York courts, Penn Central presented substantial evidence that it could not earn, either before or after the designation, a reasonable rate of return. As we discussed in the main text, this evidence was found to be insufficient by the Appellate Division and the New York Court of Appeals. The findings of the trial court were reversed (J.S.A. 45a-55a).

Throughout the amicus brief of the Real Estate Board of New York, Inc. there are statements of "fact" relating to the condition of the Terminal and the burden on the appellants to operate the Terminal (Br., pp. 27, 39). These assertions were also rejected by the Appellate Division and the Court of Appeals.

such a theory. To the contrary the Court of Appeals stated that the principles of eminent domain are not applicable to this case (J.S.A. 5a).*

In his opinion, Judge Breitel presumed that the traditional police power test would apply to the designation of an individual landmark (J.S.A. 5a).** At the beginning of his opinion, Judge Breitel stated that the landmarks designation of Grand Central Terminal was not zoning because zoning imposes both benefits and burdens on an owner and is affected pursuant to a general plan (J.S.A. 4a). Judge Breitel concluded that landmarks designation of an individual parcel is not designed to "further a general community plan" and imposes burdens on the owner without comparable benefits, even though it has an acceptable purpose distinguishing it from discriminatory or spot zoning (J.S.A. 5a-6a).

Then Judge Breitel noted that, in a particular case, there may be benefits to a landmark site sufficient to keep it within the ambit of the police power (J.S.A. 5a-6a). These benefits included the tax exemption (pltfs.' Exh. 8 at J.S.A. 91); the valuable transfer development rights; the

* For example, the appellants state that the Court of Appeals (citing its opinion at pp. 2-3) erred in holding that, in landmark cases, "compensation need not be paid for such portion of the value of air rights that the court asserted to be attributable to the efforts of 'organized society'" or the "social complex" in which the Terminal is located (App. Br., pp. 16-17). A reading of the pages cited by the appellants indicates that the Court was discussing these factors in the context of the police power and the appropriate test is reasonable rate of return.

** Our interpretation of the opinion of the Court of Appeals in the instant case has been confirmed by the New York Court of Appeals in *Modjeska Sign Studios, Inc.* v. *Berle,* —— N Y 2d ——, opinion dated December 21, 1977. In commenting on its decision in *Penn Central,* the Court noted that the landmark regulation there "did not deprive the property owner of the ability to use the regulated land in a manner which would ensure a reasonable return on its investment" (Opin., p. 5).

value of the Terminal which has been created by the public contribution, and the enormous value of the land owned by Penn Central in the area surrounding Grand Central Terminal (See pltfs.' Exh. 10, at J.S.A. 93).

The Court reasoned that these benefits justify applying to Grand Central Terminal the traditional police power test applicable to regulation of land use. Applying the traditional test, the Court of Appeals properly concluded that the appellants failed to show that the property, as restricted, was incapable of earning a reasonable rate of return.*

This is precisely the test that we discussed in subdivision 2 of our argument. The Court of Appeals went through an extra step where it considered the tax exemption, etc., because it did not see site-by-site landmark designation as being pursuant to a general community plan. We think that in this, the Court erred. As we discussed above, *supra,* pp. 25-27, the designation of individual landmarks is part of a comprehensive plan to preserve historic buildings throughout the City which plan is, in turn, integrated into the general land use plan for the entire City. The Court of Appeals' analysis could, at best, only be applicable to a municipality which has no landmarks legislation and passes a law to preserve an historic building in private ownership.

But even assuming that a single designation cannot be considered as part of a general community plan, the Court of Appeals only referred to the particular benefits to Grand Central Terminal to apply the traditional test applicable

* In their brief in discussing "anticipated economic return", the appellants, citing the opinion of the Court of Appeals, group the Terminal with "other nearby buildings" (p. 24). This is a misrepresentation of the opinion of the Court of Appeals. The Court of Appeals only referred to the increased value of the "nearby buildings" for the purpose of indicating a factor to be considered in determining whether or not the landmark parcel, as restricted, was economicaly viable (J.S.A. 13a-14a).

to a land use regulation enacted pursuant to the police power. These particular benefits place the owner of property in the same position as an owner of property in an historic district or an owner of property subject to a zoning resolution. If he can show economic hardship, he will be entitled to relief. In this case, the appellants failed to meet that burden.

(6)

We will not discuss each of the cases cited by the appellants in their brief. Those cases, including *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) and *United States* v. *Causby,* 328 U.S. 256 (1946), involve the application of the principles of eminent domain where there has been a physical invasion of the owner's land or some other governmental action which interfered with the existing use. In the instant case, the property, as restricted, is continuing to function as a terminal. The appellants have used these cases in support of their argument that the New York Court of Appeals found the instant designation to be a taking, but incorrectly denied just compensation therefor. As we discussed above, *supra,* p. 21, this argument is based on the improper assumption that the landmark parcel consists of two distinct properties, the Terminal and the air rights above the Terminal. This taking argument is not supported by the opinion of the Court of Appeals. The Court of Appeals stated that there had been no taking and found that the principles of eminent domain were not applicable to the case (J.S.A. 5a). The appropriate issue in this case is whether the land use regulation has made the property economically unviable. We have shown that the appellants did not sustain their burden of proof on this issue.

II Assuming, arguendo, that the Landmarks Law is invalid as applied to Grand Central Terminal, the appellants are in no event entitled to damages or compensation. There has been no legally authorized, or de facto, exercise of the power of eminent domain. The invalidation of a police power regulation does not entitle the property owner to a money judgment.

Assuming, arguendo, that the Landmarks Law is invalid as applied to Grand Central Terminal, the appellants are not entitled to damages or compensation.

The issue of an award of compensation for an inverse condemnation was raised in *French Inv. Co.* v. *City of New York,* 39 NY 2d 587, 350 N.E. 2d 381 (1976). In *French,* the Court of Appeals held that an amendment to the zoning resolution which rezoned the parks in Tudor City in Manhattan was unconstitutional but that this did not constitute a compensable taking. The Court of Appeals however, on the ground that the issue was not properly raised, refused to determine whether the plaintiff would be entitled to damages flowing from an illegal exercise of discretionary governmental power. 39 NY 2d at p. 599, 350 N.E. 2d at p. 388. The plaintiffs sought review of the denial of an award of compensation in this Court. The appeal was dismissed. 429 U.S. 990 (1976).

In *Mailman Development Corporation* v. *City of Hollywood,* 286 So. 2d 614 (Fla. App., 1974), cert. den. 293 So. 2d 713, cert. den. 419 U.S. 844, the State Court upheld the dismissal of one count of a complaint which pleaded a taking by reason of the confiscatory effect of a zoning change challenged in another count of the same complaint.

In this case, there could be no cause of action for an inverse taking. The provisions of the Landmarks Law at issue here were enacted pursuant to the police power. There has been no attempt to appropriate Grand Central

Terminal to public ownership. The challenged actions of the Landmarks Commission, in designating the Terminal a landmark and in denying the appellants a certificate of no exterior effect or a certificate of appropriateness, could not legally have effected a condemnation justifying an award of compensation. The authority to exercise the power of eminent domain requires capital budget action under New York City Charter, Chapter 9. The procedures for a condemnation in New York City are set forth in the New York City Administrative Code, Section B15-1.0 et seq. See also New York City Charter, Section 382. Compare 207-8.0 (g)(2) of the Administrative Code (J.S.A. 100a), which specifically provides for condemnation with respect to landmarks in certain instances not applicable here. Even then, it is not the Landmarks Commission which is authorized to condemn. The Commission is authorized only to make recommendations to the Mayor; then the City has the option of instituting condemnation proceedings.

Nor can it be said to be a de facto taking. There has been no physical invasion of the land, ouster of the owner, or official action interfering with the appellants' use of its property sufficient to constitute a de facto taking. Cf. *City of Buffalo* v. *Clement Co.*, 28 NY 2d 241, 255-257, 269 N.E. 2d 895, 903-904 (1971); *Matter of Charles* v. *Diamond*, 41 NY 2d 318, 329, 360 N.E. 2d 1295, 1303 (1977).

Nor do the appellants have a cause of action for damages. A statement on the applicable principle was set forth in *Veling* v. *Ramsey*, 94 N.J. Sup. 459, 228 A. 2d 873 (1967). In *Veling*, plaintiff brought an action for damages for the loss of the use of property following the invalidation of successive zoning amendments. The municipality's defense was good faith action in reliance upon opinions of planning experts. In awarding summary judgment to the municipality, the Court stated (228 A. 2d at 874):

> "The adoption of these amendments to the zoning ordinance by the governing body represents the exercise of a discretionary governmental function.

> No cause of action against the municipality can be grounded on the alleged invalidity of such an official legislative determination. *Visidor Corp.* v. *Cliffside Park*, 48 N.J. 214, 225 A. 2d 105 (1966) * * *.
>
> The power of a municipality to adopt zoning regulations pursuant to statutory authority is an essential aspect of the police power. The governing body must be free to exercise that power in good faith to amend or alter its zoning regulations when it determines the public interest so requires, to hold otherwise would saddle municipalities with oppressive financial burdens and litigation which would seriously impair if not nullify, their power to perform a vital governmental function. See *Visidor Corp.* v. *Cliffside Park*, supra."*

To similar effect is *Matter of Charles* v. *Diamond*, 41 NY 2d 318, 331-332, 360 N.E. 2d 1295, 1304-1305 (1977); *Superior Uptown Inc.* v. *City of Cleveland*, 39 Ohio St. 2d 36, 313 N.E. 2d 820 (1974); *Mailman Development Corporation* v. *City of Hollywood*, 286 So. 2d 614, 615 (Dist. Ct. of App., Fla., 1974), cert. den. 293 So. 2d 717, cert. den. 419 U.S. 844 (1969); *HFH, Ltd.* v. *Superior Court of Los Angeles County*, 125 Cal. Reptr. 365, 542 P. 2d 237, 242-243 (1975), cert. den. 425 U.S. 904 (1976); *Visidor Corp.* v. *Cliffside Park*, 48 N.J. 214, 225 A.2d 105 (1966), cert. den. 386 U.S. 972 (1966).

If a contrary rule were established permitting an award of damages for an invalid police power regulation, public officials would be reluctant to enact innovative but untested legislation. The result would be a substantial disruption in the functions of municipalities with respect to projects involving discretionary action such as the building of highways, regulation of noise, zoning and landmarks preservation.

CONCLUSION

The order appealed from should be affirmed, with costs.

March 1, 1978.

Respectfully submitted,

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